

NOT TO BE PUBLISHED

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Calaveras)

| | |
|---------------------------|------------------------|
| THE PEOPLE, | C042735 |
| Plaintiff and Respondent, | (Super. Ct. No. F2615) |
| v. | |
| LEONARD JESSIE MITCHELL, | |
| Defendant and Appellant. | |

Defendant Leonard Jessie Mitchell appeals his convictions for assault with a firearm, making criminal threats, being a felon in possession of a firearm, negligently discharging a firearm, misdemeanor battery and misdemeanor brandishing a weapon. His sole contention on appeal is that the court improperly coerced the jury's verdicts. We disagree and shall affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Given the lone issue on appeal, a lengthy recitation of the facts underlying defendant's convictions is unnecessary. In

sum, defendant and his neighbor got into a fight after the neighbor was rude to defendant's stepson.

After approximately three days of trial, the jury commenced deliberations. At 4:50 p.m., after approximately four hours of deliberations, the court and counsel met with the jury, whereupon the following conversation was had:

"THE COURT: We are back on the record. Mr. Mitchell is present, Mr. Chavez-Ochoa, Ms. Yook, Detective Anenson and our 12 trial jurors, our alternate juror is not present. Who is the foreperson of the jury? Juror 17024[.] It's getting close to five o'clock. And I was thinking of bringing you folks back on Tuesday at nine in the morning. Do you think it would, would you like to try and stay a little more tonight or you want to come back next Tuesday? We can't come back Monday, it's a holiday.

"THE JUROR: We have just one issue that we are not unanimous on so would it be possible to talk to you regarding this for maybe some advice or --

"THE COURT: Well, if [you have] a particular question you can address it to the Court on the question forms that we have, I would then have to discuss it with the attorneys and we can formulate a response if we can.

"JURY FOREPERSON: Right. I don't think it's a matter of that. I think it's well actually it's just we are not agreeing on some things.

"THE COURT: Is it your opinion that the jury as to that particular issue is hopelessly deadlocked, do you think any

additional amount of time would, or amount of deliberation would change that?

"JURY FOREPERSON: I think, I think if you give us a little while longer here we may be able to come to a decision.

"THE COURT: Okay. Now five o'clock [sic] they shut down the climate control system and everything else. So there is that.

"JURY FOREPERSON: Right we can come back.

"THE COURT: We can come back Tuesday at nine o'clock if you want.

"JURY FOREPERSON: We have a problem with that.

"THE COURT: Okay.

"JURY FOREPERSON: I believe we have one juror that can't come back on Tuesday. So we have to start over again is that correct? She is having surgery.

"THE COURT: If we had someone [who] couldn't come back I would have to substitute in the alternate juror and you would have to start your deliberation over again. Why don't I let you go back to the jury room for a little while.

"JURY FOREPERSON: Just maybe ten more minutes.

"THE COURT: Sure."

The jury resumed deliberations and returned a verdict finding defendant guilty approximately 15 minutes later. Following the return of the verdicts, the court noted that there was the remaining issue of a prior serious felony allegation to be determined. The court was assured by the People the presentation of evidence on that matter should only take a

couple of minutes. Thus, the court decided, "Doesn't seem like a lot of sense to come back next Tuesday for that purpose. So we will take a brief recess and get started with that then." Ultimately, the jurors were excused at 5:51 p.m.

DISCUSSION

Defendant contends the comments to the jury improperly coerced its verdict, "[b]y causing the jurors to feel rushed to reach verdicts, and warning them that their work thus far would be wasted if they could not complete their task" He complains that the court's comments "were not altogether accurate," noting that the court could have taken partial verdicts and requiring the reconstituted jury to only consider any remaining charges. Further, defendant contends that the court's "remarks at 4:50 p.m. implying that the jurors would soon have to leave the courthouse were also misleading." We disagree.

As the People note, defendant failed to object to the court's comments about which he now complains. Defendant's argument that failure to object to instructions given to the jury does not waive the issue is inapposite. The comments at issue here were not instructions. Thus, contrary to defendant's claim, his failure to raise any complaint to the court's statements has waived this issue on appeal. (*People v. Williams* (1997) 16 Cal.4th 635, 686-687.) Nonetheless, even if the issue was not waived, it is without merit.

"Coercion has been found where the trial court, by insisting on further deliberations, expressed an opinion that a

verdict should be reached.” (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775.) The basic question is “whether the remarks of the court, viewed in the totality of applicable circumstances, operate to displace the independent judgment of the jury in favor of considerations of compromise and expediency. Such a displacement may be the result of statements by the court constituting undue pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all.” (*People v. Carter* (1968) 68 Cal.2d 810, 817.)

“In order to determine whether the judge’s comments were impermissibly coercive, the court must evaluate them ‘in [their] context and under all the circumstances.’ [Citations.]”

(*Packer v. Hill* (9th Cir. 2002) 291 F.3d 569, 578.) Further, while a judge may not command, unduly influence or coerce, he may advise. (*Wissel v. U.S.* (2d Cir. 1927) 22 F.2d 468, 471.)

Here, the trial court’s conversation with the jury was not coercive in nature, it was advisory. Late on Friday afternoon, the jury was essentially given the choice between staying to deliberate further, even though the climate control system would be shut down, or returning on Tuesday and restarting deliberations with an alternate juror. The jury agreed to continue deliberations that evening. Advising the jury the climate control would be shut down was not tantamount to telling them they would have to leave the building. Nor did advising the jury of the effect on deliberations of replacing a juror exert undue pressure on the jury to reach a speedy verdict. Here, the jury was advised of various factors which might affect

their decision to continue deliberations that day or to return following the weekend. The jury believed it needed only about 10 more minutes of deliberation to reach a verdict on the final point. Based on all of these factors, the jury itself chose to continue deliberations that evening. That the jury returned with its verdict approximately 15 minutes later simply reflects that it was fairly accurate in its estimation of how much additional time it needed for deliberation, not that it was improperly coerced. There is simply nothing in the court's comments which could be construed as an attempt to pressure or coerce the jury. Accordingly, defendant's claim is rejected.

DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.